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GEORGE ROUNTREE, *of Counsel.*

ROBERT D. GILMER,
Attorney-General.

JAMES S. SHEPHERD,
JAMES H. MERRIMON,
Counsel for the State of North Carolina.

No. 9—ORIGINAL.

IN THE

SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

THE STATE OF SOUTH DAKOTA, COMPLAINANT,

vs.

THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS, DEFENDANTS.

ARGUMENT OF GEORGE ROUNTREE, OF COUNSEL FOR DEFENDANT, NORTH CAROLINA.

May it please the Court:

Most of us thought, after the passage of the Eleventh Amendment, and the decisions of this Court in *Louisiana vs. Jumel,* 107 U. S.; *New Hampshire vs. Louisiana,* 108 U. S.; *In re Ayres,* 123 U. S.; *Christian vs. The Atlantic and North Carolina Railroad,* 133 U. S.; *Hans vs. Louisiana,* 134 U. S., and *Smith vs. Reeves,* 178 U. S., 436, expounding and applying that amendment, that the ingenuity of counsel for speculators in the repudiated public securities of a State, often irregularly if not illegally issued, was exhausted, but that was a mistake. We have here another and even bolder attempt to nullify that amendment, for while this suit is in name one between the State of

South Dakota as complainant and the State of North Carolina and others as defendants, it is apparent that it is, in purpose and effect, one by individual holders of bonds, using the name of the State of South Dakota against the defendant, the State of North Carolina.

This proposition and the evidence upon which it rests we will discuss a little later.

We understand the law to be firmly settled that a sovereign State cannot be sued in this or any other court without its consent, and the only question is whether that consent has been given. It has not been expressly given; on the contrary, the State of North Carolina challenges the jurisdiction of this Court and protests against its exercise; and if consent has been given at all it must be because the suit is embraced in the grant of judicial power to this Court by the Constitution.

This we deny; and we contend that:

1st. Such a suit is not within the original grant of judicial power to this Court—is not such a "controversy between two or more States" as was contemplated by the Constitution; and

2d. If it were originally included within the grant it has been withdrawn by the Eleventh Amendment, because the suit is in effect a suit by or on behalf of private individuals against a State.

Complainant argues that this cause comes within the very words of the constitutional grant of judicial power to this Court, and does not need any construction; and, secondly, that even if this clause needed construction, this Court ought to adopt the one "liberal in the extreme to favor such jurisdiction and to

carry out the beneficent purposes by the Constitution sought to be obtained."

In support of these propositions counsel argues that from the beginning there have been two schools of thought with reference to the construction of the Constitution in this respect: one represented by the argument of Mr. Justice Wilson and the other by the argument of Mr. Justice Iredell in Chisholm's case; and they insist that the Court should adopt the argument of Mr. Justice Wilson, because it would be so much more convenient and more beautiful in theory to have all causes of complaint against every one, including sovereign States, to be determined by this tribunal.

But both of these propositions have been in their universality expressly negatived by the decisions of this Court. There are many cases, some of them cited in the brief, the latest of which is *Smith vs. Reeves,* 178 U. S., 436, which expressly hold that the mere fact that a controversy is included within the language of the grant of judicial power is not conclusive of the question of jurisdiction; and this Court has already, as it seems to us, definitively adopted the line of thought advocated by Mr. Justice Iredell. So that neither of the contentions of the complainant settle the controversy, unless, indeed, they settle it by implication in favor of the State of North Carolina.

See *Hans vs. Louisiana,* 134 U. S., 1.
Smith vs. Reeves, 178 U. S., 436.
Miller's Lectures on the Constitution, p. 382.

The clause of the Constitution conferring original jurisdiction upon this Court to hear and determine "controversies be-

tween two or more States" has received much consideration within the last few years, but the Court has uniformly refused to give an authoritive definition of the word "controversies," and has decided each case upon its own merits—upon a consideration of whether it did or did not come within the true meaning and spirit of the Constitution; and while the cases have been too few to enable us to formulate a rule for the solution of each case as it arises, we do know that the court proceeds with the utmost caution in all suits against the States, and that it is not alone sufficient for him who asserts such jurisdiction to appeal to the letter of the Constitution. "We must look," as Mr. Justice Shiras said, in *Missouri vs. Illinois*, "*not merely to its language, but to its historical origin, and to those decisions of this Court in which its meaning and the scope of its operations have received deliberate consideration.*"

The genesis of the clause is said to be found in the experience of the colonies and of the States under the Articles of Confederation.

At an early period in our history sharp disputes arose between the colonies as to boundaries and other questions, one of which, relating to boundary—that between Pennsylvania and Maryland—was decided by Lord Hardwicke in the Court of Chancery; and so when the Articles of Confederation came to be agreed to they contained a clause conferring jurisdiction upon Congress to decide disputes "between two or more States concerning boundary, jurisdiction or any other clause whatever."

Notwithstanding the comprehensiveness of this grant and the fact that bitter disputes arose between some of the States, grow-

ing out of injuries inflicted upon the citizens of some by the discriminating and hostile commercial and monetary laws of others—Connecticut, in retaliation, going so far as to pass laws forbidding her courts to try cases of Rhode Island creditors against Connecticut debtors (Ford's note to 7th No. of the Federalist)—not a single controversy of such a nature was submitted, while one arising directly between the States out of conflicting claims of boundary had been determined and several others were pending at the time of the adoption of the Constitution!

When the delegates met in convention to form the Constitution, in the effort to "insure domestic tranquillity," they took great pains to prevent disputes arising between the States by depriving them of all power to discriminate against the citizens of other States and by forbidding them to make compacts and agreements without the consent of Congress; but no method was discovered of dealing with controversies, either present or future, growing out of trespasses by one State upon the rights of another, other than the old method of submitting them to an impartial judicial tribunal.

And while it is settled that the word "controversies" is not to be restricted to disputes concerning boundary and jurisdiction, we respectfully insist that it ought to be confined to cases of the same general kind—to those which arise immediately between the contending States—to those in which, granting plenary jurisdiction in the courts for individual and State alike, adequate redress could only be had by the action of the State; and it ought not to be expanded to include disputes which arise between individuals and States, and which are assigned, conditionally or

absolutely, by such individuals to another State for the purposes of suit.

This we would naturally infer to be its meaning from the origin and history of the clause, and that inference is strengthened by the decisions of this Court, in which it has been considered.

In *United States vs. Texas*, 143 U. S., 621, speaking of this clause, Mr. Justice Harlan says, on page 639:

> "At the time of the adoption of the Constitution, there existed, as this Court said, in *Rhode Island vs. Massachusetts*, 12 Peters, 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States."

Accordingly we find that this Court has entertained jurisdiction of several controversies between States growing out of conflicting claims of soil, territory, jurisdiction and boundary, and of none other, except in the recent cases of *Missouri vs. Illinois*, 180 U. S., 208, and *Kansas vs. Colorado*, 185 U. S., 125.

In each of these cases the controversy arose immediately and directly between the contending States, and grew out of State action deemed by the complainant in each case to be injurious not only to her citizens but to her sovereign rights, and which,

if done by an individual, could only be adequately redressed by an action on behalf of the public—the State.

On the other hand, in *New Hampshire vs. Louisiana,* 108 U. S., 76, this Court held that it had no jurisdiction of a controversy arising between the State of Louisiana and the holders of her repudiated bonds, and which bonds and controversy had been assigned to the State of New Hampshire by the individual holders for suit.

It is true that the Court emphasized the fact that the bonds were assigned merely for the purpose of collection, and the complainant was not the beneficial owner thereof, even though she had full right to receipt and acquit the debtor, but it by no means follows that the decision would have been the other way if New Hampshire had been the actual owner of the bonds. Indeed, the Chief Justice says, towards the end of his opinion:

> "One State cannot *create a controversy with another State,* within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other States to its citizens."

And these decisions seem to have been supposed by Mr. Justice Miller to vindicate the opinion of Hamilton, that a justiciable controversy against a State could not be created by the assignment of the debts of a State.

In *Cunningham vs. Macon and Brunswick R. R. Co.,* 109 U. S., 446, referring to those cases, he said, on page 450:

> "These latter suits (*New York* and *New Hampshire vs. Louisiana*) were based on the proposition that the constitutional provision that States might

> sue each other in this Court would enable a State whose citizens were owners of obligations of another State to take a transfer of those obligations to herself and sue the defaulting State in the Court. The doctrine was overruled in those cases at the last term by the unanimous opinion of the Court."

See also his comment on these cases in his lectures, page 382.

And here we desire to call the attention of the Court to the fact that the case of *New Hampshire vs. Louisiana,* 108 U. S., 76, expressly negatives the opinion expressed by Judge Curtis in the *North American Review* for January, 1844, and by General B. T. Johnston in 12 American Law Review, relied upon by counsel for complainant, that citizens of a foreign State could assign their bonds, or other debts, against one of the States of this Union, to a foreign State, and that that State might collect such debts by an action in this Court. In their opinion it apparently made no difference whether the complainant State was beneficial owner, or trustee with power of acquittance.

This Court has more than once said that its original jurisdiction was limited, and strongly implied that it was not to be extended by construction. (Miller, J., in *Cunningham vs. M. & B. R. R. Co.,* 109 U. S., 446, 451. Fuller, C. J., in *Cal. vs. So. Pac. Co.,* 157 U. S., 229, 257, and in *Louisiana vs. Texas,* 176 U. S., 1, 15), and in *Louisiana vs. Texas, supra,* it was distinctly held that this Court had jurisdiction *only* of those controversies which arise directly between the contending States, and that a suit cannot be brought by a State merely to redress the wrongs of its citizens.

If the term "controversies" is to be confined to those cases in which the controversy arises immediately and directly between the contending States and growing out of their public relations and intercourse, as we think it ought to be, that is an end of this case, because the pleadings and proofs show that it not only did not arise directly between the States of South Dakota and North Carolina, but the controversy arose between individuals, the Schafers—holders of those so-called second mortgage bonds—and the State of North Carolina and the State of South Dakota became interested in it as transferee *pro tanto*, and as the result of elaborate machination and contrivance.

Many reasons may be urged in support of the proposition that this suit does not fall within the meaning of the term "controversies," as contained in the clause of the Constitution conferring original jurisdiction upon this Court. It is settled by numerous decisions that ALL controversies are not included, and, although Mr. Justice Bradley in *Hans vs. La.*, 134 U. S., 1, 15, said some things were made justiciable by the Constitution which were not known as such under the common law, he refers, by way of illustration, only to such things as boundaries, which had been the subject of judicial settlement by Congress under THE ARTICLES OF CONFEDERATION, and adds:

> "OF OTHER CONTROVERSIES BETWEEN A STATE AND ANOTHER STATE, or its citizens, which on the settled principles of public law are not subjects of judicial cognizance, this Court has often declined to take jurisdiction."

Again, in the same case, he says:

> "The truth is, that the cognizance of suits and actions UNKNOWN TO THE LAW AND FORBIDDEN BY THE LAW, was not contemplated by the Constitution when establishing the judicial power of the United States."

He then proceeds to show, by quotations from the writings and speeches of Hamilton, Madison and Marshall, advocating the adoption of the Constitution, and replying to the arguments of Patrick Henry, George Mason and Richard Henry Lee, that States were not suable at all without their consent, and that the Constitution did not authorize suits *against them upon their debts,* and quotes with approval this extract from the opinion of Mr. Justice McLean, delivering the opinion of the Court in *Bristow vs. Bank of Kentucky,* 11 Peters, 257, 321:

"What means of enforcing payment from the State had the holder of a bill of credit? * * * No sovereign State is liable to be sued without her consent.—UNDER THE ARTICLES OF CONFEDERATION, a State COULD BE SUED ONLY IN CASES OF BOUNDARY. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

This, by the way, notwithstanding the fact that by the Eleventh of the Articles of Confederation jurisdiction was conferred upon Congress to hear and determine all disputes and differences "BETWEEN TWO OR MORE STATES CONCERNING BOUNDARY, JURISDICTION OR ANY OTHER CAUSE WHATEVER."

And we have been able to find no case in which this Court has

entertained jurisdiction in a *suit on a debt* against a State *without the express consent of that State,* save in Chisholm's case, and that case was expressly disapproved by Mr. Justice Bradley in *Hans vs. Louisiana,* who expressed the opinion of all the members of the Court, except that of Mr. Justice Harlan, that the views of Mr. Justice Iredell in Chisholm's case were clearly correct.

We do not include the case of *U. S. v. N. C.,* 136 U. S., 211, because that was a clear case of CONSENT EXPRESSLY GIVEN; and the Court always has jurisdiction in such cases. *Clark vs. Barnard,* 108 U. S., 476; *Minnesota vs. Hitchcock,* 185 U. S., 373, 386.

To return. Mr. Justice Iredell, following Hamilton, Madison and Marshall, but without quoting them, had earnestly insisted that no action would lie against a State to collect a debt.

And Hamilton, in his report to Congress, 1785, said:

> "Public debt can scarcely, in legal phrase, be defined either as property in possession or in action. It is evidently not the first till it is reduced to possession by payment. To be the second, would suppose a legal owner to compel payment by suit. Does such a power exist? The true definition is, a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

Chief Justice Taney in *Bank of Washington vs. Ark.,* 20 Howard, uses this language:

> "Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the

> State; and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State, and the Courts of the United States are expressly prohibited from exercising such jurisdiction."

And Mr. Webster, in an opinion given to Baring Brothers and quoted with approval by Mr. Justice Bradley, in Hans' case, said:

> "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress, that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."

These expressions ought to be sufficient evidence that in the opinion of many of our leading judges and statesmen, State debts were not intended to be made collectible by law.

Another argument against such suits urged by Hamilton with much force and cogency in the 81st No. of the Federalist, and by others, is that the Court will not take jurisdiction of suits against States for debts, because, in the great majority of such cases, the Court would have no process by which it could enforce the decree. Indeed, the only conceivable way would be for the Court to supercede the officers of State having control of its fiscal affairs, and appoint a receiver to manage the State's business.

This the Court is not prepared to do (*Giles vs. Harris,* 189 U. S., 475), as it seems to have put the stamp of its approval upon Hamilton's argument. For in *U. S. vs. Guthrie,* 17 How., 284, Mr. Goodrich was appointed Judge, and, before the expira-

tion of his term, he was removed and Mr. Fuller was appointed in his stead and received the salary, brought mandamus against the Secretary of the Treasury to compel its payment. Upon writ of error this Court said:

> "The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this Court, to command the withdrawal of a sum or sums of money from the treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling consideration; nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the Courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or rather under such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the Courts, in the enforcement of their views of private interests."

Of course the argument is equally valid against interference with the State Treasury; indeed the Constitution of North Carolina expressly forbids the taking of money from the treasury except by legislative warrant.

If it be said that this argument does not apply to the present case because property has been mortgaged which can be seized by the Court, sold and the proceeds applied to the payment of the debt, it is sufficient to say that as we have attempted to show in the brief, no particular property has ever been designated, identified or set apart, as covered by the mortgage, and complainant has, if anything, only an action for debt, and the argument just made is valid.

Nor do we think that it can be shown that such a jurisdiction, however convenient, is of any great value or necessity. The fact that all civilized nations, including the States of this Union, have been large borrowers at various times, and have been compelled to issue public securities to raise money, and that there has been no practical difficulty in so doing, growing out of the settled principle of law of almost if not quite universal acceptance, that, in the language of Chief Justice Taney, "those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State," has not seriously impaired the power to borrow, would seem to be conclusive of the lack of necessity for this jurisdiction. And the fact that it has not been expressly given, apparently, in any country, would seem to show grave apprehension of danger from its exercise. See Lord Halsbury's speech in the "Scotia" (1903), A. C., 501, 506.

But if this Court has jurisdiction to entertain suits against States to collect debts at all, we contend that it ought to be confined to cases in which the debt was due by one State to another upon contracts, transactions, dealings directly between the States—to cases in which the States understand at the time of entering into the transaction that it was enforcible by law—and should not be extended to cases where the obligations were due to private individuals, and which they, being unable to collect, assigned to another State for collection, even though the collecting State was to be the beneficial owner of the proceeds.

In the first place it was evidently the opinion of Hamilton that the Constitution did not authorize, or permit, suits to be brought against States on their debts as the result of assignments; for, although he only refers to suits as the result of assignments to citizens of other States, the purpose of his argument was to show that in no event need the State fear that they would be compelled to pay their debts by suit in the Federal Courts. Apparently, it never occurred to him, nor, so far as we could learn, to any of the other advocates of the Constitution—nor to its opponents—that the real danger to the State of being compelled to pay their debts by the process of the Courts lurked in the generality of the clause conferring jurisdiction upon this Court of "controversies between two or more States." It probably was not apprehended by the people when the Eleventh Amendment was adopted; it had not occurred to Chief Justice Marshall when he delivered the opinion in *Cohens vs. Virginia,* and the first intimation of it that we have been

able to find is contained in a note by Kent to his Commentaries, who speaks of it but to doubt it.

In the next place:

To permit these bonds to become actionable by assignment is to hold that the burden of an obligation can be increased by assignment beyond what was intended to be assumed by the obligor, for it is certain that the State did not intend, nor did those who took them understand, that there should be other sanction for their collection than the plighted faith of the State.

In *Tolehurst vs. Cement Manufacturers* (1901), 2 K. B., 811, Mr. Justice Matthew said:

> "Whenever by reason of change of business or change of parties the result of an assignment would be to impose upon one of the contracting parties a greater liability than he ever intended to assume, the contract cannot be assigned."

The case has been reversed by the House of Lords, but this principle was expressly approved.

Lord Lindlay's Speech (1903), A. C., 423.

It cannot be said that the "burden of the obligation" is not increased, but only a remedy given, because, both practically and legally, the remedy is a very essential part of the obligation. If to take away the remedy is to impair the obligation, why should not giving a remedy where none existed be an increase, more properly a creation of the obligation?

That conferring the quality of suability upon obligations not originally suable is an increase of the burden is sustained by

the authority of Chief Justice Jay, who, towards the end of his opinion in Chisholm's case, said:

> "That such suability may, nevertheless, not extend to all demands, and to every kind of action there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State and at a time when no idea or expectation of judicial interposition were entertained or contemplated."

This fits our case.

Again, it seems to be settled that when the sovereign comes into court voluntarily and invokes its aid, it waives its exemption and submits to the application of the same principles by which justice is administered between individuals.

The only exceptions to this rule are laches and the statute of limitations. Notwithstanding the fact that the government, either State or National, is not barred by the statute of limitations, this Court held in *U. S. vs. Buford,* 3 Peters, 12, that a claim barred by the statute of limitations, in the hands of the assignor, and afterwards assigned to the United States, could not be sued on; and the Court stated the law to be that "the assignment of a claim to the government gives it no greater validity than it possessed in the hands of the assignor." To the same effect is

U. S. vs. N. C. & St. L. R. Co., 118 U. S., 125.

These authorities seem to us to be directly in point. A person holding an obligation of another which is barred by the

statute of limitations has a valid moral claim against the person whose obligation he holds, but it is an imperfect obligation, that is, there is no remedy for its enforcement; so an individual holding an obligation of a State has perhaps a valid moral claim against the State, but it is one of imperfect obligation, because there is no remedy to enforce it. The two cases seem to be analogous with reference to the remedy, and, if a remedy is not given in the one case by assignment to another State, we can see no reason why it should be given in the other.

Again, we insist that an assignment merely for the purposes of litigation against a State is against public policy and void.

> "At common law the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and, although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy."

The judiciary act of 1789 (the work of Elsworth, C. J., an influential member of the Constitutional Convention), and all subsequent ones, prohibits suits by assignees unless the assignor could sue, and while the act applies only to the District and Circuit Courts, and there are exceptions, it manifests a general policy of the law with reference to the effect of assignments as giving jurisdiction, which may furnish an analogy in cases of doubt.

Such an assignment contravenes the policy or spirit of the Eleventh Amendment.

Certainly one of the fundamental purposes of the formation of the Constitution was to insure domestic tranquility, and

jurisdiction of controversies between two or more States was given to the Supreme Court for the purpose of allaying strife—not for the purpose of fomenting quarrels. What surer method of arousing animosities, engendering discord and retaliations can be conceived than by encouraging such suits? Such, at any rate, is the lesson of experience—of the Chisholm case—and assignments for such purpose are, we submit, against the highest consideration of public policy, peace and good will among the States.

Not only that, but the main purpose of the people of the several States in adopting the Eleventh Amendment, according to Chief Justice Marshall in *Cohens vs. Virginia,* was to prevent States from being compelled by the compulsive process of courts to pay debts due to individuals, which neither party regarded as suable when created; and, if a debt, disowned, can be collected by the simple device of assigning it to a State, then indeed the Eleventh Amendment becomes a dead letter—is a ridiculous mouse from the labor of the mountain. *Individuals can compel the payment of their debts by threat of assignment, or, as here, enforce payment by giving a complainant State a substantial commission for collection.*

> "Whatever is done in fraud of law is done in violation of law." *Lee vs. Lee,* 8 Peters, 44, 50.

We, therefore, earnestly insist that to permit suits in this Court by one State against another upon a debt growing out of transactions or contracts entered into immediately between two or more States would produce comparatively little inconvenience to the fiscal affairs of the States or otherwise, but to

permit suits like this to be brought in this Court upon public securities issued by a State to individuals, and upon which neither party, at the time of the inception of the contract, had the least idea that a legal action could be brought, is to produce all the evil results apprehended by the people when they reversed the action of this Court in Chisholm's case by the prompt adoption of the Eleventh Amendment, *and that by indirection.*

THIS PARTICULAR SUIT IS FORBIDDEN BY THE ELEVENTH AMENDMENT.

The bill shows that the effect of a successful prosecution of this suit is to collect mortgage bonds due to the complainant, the State of South Dakota, AND TO THE INDIVIDUAL HOLDERS of all similar bonds; and we think the bill, answer of the representative of the individual bondholders, and proofs, show that the suit is by, or on behalf of, individuals—using the name of the complainant State and PAYING HER A FEE IN BONDS to collect the bonds retained by them. In either event the suit is forbidden by the Eleventh Amendment.

First as to the bill:

Paragraphs III and IV allege the ownership by the State of North Carolina of 30,000 shares of stock in the North Carolina Railroad Company of the par value of $3,000,000, and the execution of a statutory second mortgage upon such an amount of the State's stock as should equal the par of the bonds issued under the act mentioned "for the security of the bonds held by your orator, AND OF ALL OTHER BONDS OF THE SAME ISSUE." Paragraph XII alleges that complainant is entitled to pay off the first mortgage bonds, or for a sale of so many shares thereof as

may be required to pay off and discharge the FIRST AND SECOND MORTGAGES. Paragraph XIII, that the rights of the complainant cannot be fully administered without the presence before the Court of the holders of the second mortgage bonds, "the matters to be herein determined being of interest, general and common, to all of said bondholders," and, as they are very numerous, Charles Salter is made a party as representative of the class, and the prayer of the bill asks that the number and amounts of the first and second mortgage bonds be ascertained, and that a sufficient number of the shares of the State's stock be sold to pay off and discharge all the FIRST AND SECOND MORTGAGE BONDS OUTSTANDING.

Charles Salter, the representative of the individual holders, is not joined as co-complainant, but is made defendant; however, there is no allegation that he declined to join as plaintiff, and his answer and the brief of his counsel show that he is most anxious to join in the relief.

It is manifest that if we are to look at things and not at names, at substance and not at forms, the suit presents a controversy between the holders of all second mortgage bonds, including South Dakota and Charles Salter, representing individual bondholders, as complainants against the State of North Carolina and Simon Rothschild as defendant.

Under the judiciary acts conferring jurisdiction upon the Circuit Courts of the United States "of all suits * * * in which there shall be a controversy between citizens of different States," the Court, in order to ascertain whether it has jurisdiction—whether the CONTROVERSY is between citizens of differ-

ent States—re-arranges the parties according to their real interest in the controversy. So, when the Constitution confers the limited and exceptional jurisdiction upon this Court of "controversies between two or more States," the Court ought to look beyond the forms used by the pleader to the facts in order to ascertain between whom the controversy really exists, and if necessary, re-arrange the parties. It is, however, not necessary to re-arrange the parties in order to show that this suit is by, or for the benefit of, Charles Salter.

In *Blacklock vs. Small,* 127 U. S., 95, Jacob Small, a citizen of the State of South Carolina, executed a bond to Blacklock, for the sum of $10,600, a mortgage to secure same upon certain property in said State.

Blacklock assigned and transferred for value the bond to Alex. Robertson, in trust, for the three children of Blacklock, Emma Jane Blacklock, Mary Blacklock and Helen Robertson Blacklock. Small pretended to pay the bond and mortgage to Robertson in the notes of the Confederate States, and Robertson satisfied the mortgage of record and delivered up the bond to Small.

Two of the children of Blacklock, Emma Jane and Mary, being citizens and residents of the State of Georgia, brought a bill in equity in the Circuit Court of the United States against Small, a citizen of South Carolina, for the purpose of annulling the payment of the bond in Confederate notes, the satisfaction of the mortgage, and for the re-establishment and foreclosure of the said mortgage lien.

Small interposed a plea to the jurisdiction, because the plain-

tiff, as well as himself, were citizens of South Carolina when the bill was filed. The plea was overruled. Small answered, as did also Robertson. The defendant, Helen Robertson Blacklock, put in an answer admitting the allegations of the bill and generally joined with the plaintiffs in the prayer for relief.

This Court decided that the Circuit Court was without jurisdiction, and directed it to dismiss the bill. Mr. Justice Blatchford delivering the opinion of the Court, on page 104 said:

"There is another difficulty in the case, on the question of jurisdiction. The bond was a unit; and the assignment of the bond by Blacklock to Robertson in trust for the children of Blacklock was a unit. The bond cannot be enforced against Small, nor can the mortgaged premises be sold, in favor of the two plaintiffs alone. THE RELIEF ASKED IN THE SUIT MUST NECESSARILY be for the benefit of the defendant, Helen Robertson Blacklock, as well as for the benefit of the plaintiffs, especially as by her answer she arranges herself on the side of the plaintiffs as against Small, joins in the prayer of the bill, and asks that the payment of the bond and the satisfaction of the mortgage be declared void, and that the bond and mortgage be declared valid in the hands of Robertson, as trustee, for the benefit of herself and the plaintiffs, and that Small be decreed to pay to herself and the plaintiffs the amount of money secured by the bond and mortgage, with interest. The suit is, therefore, shown to be one substantially by and for the benefit of Helen Robertson Blacklock, and the proofs show that at the time of the commencement of the suit she was and has since then always

continued to be a citizen of South Carolina, of which State Small was and is a citizen."

There can be no question, then, that according to the allegations of the bill this suit is "by and for the benefit of" individual bondholders—represented by Charles Salter—as well as for the benefit of the State of South Dakota. Can such a suit be sustained?

We think not.

Without taking into account the prohibitions of the Eleventh Amendment it could not be.

This Court has more than once said that its original jurisdiction over "controversies" in which States are parties is limited and not to be expanded by construction.

When a State consented to be sued by another State in a proper controversy it certainly did not thereby expressly consent to be sued by such State AND AN INDIVIDUAL, and to hold that it did requires decidedly expansive construction.

Such is the expressed opinion of Mr. Justice Curtis, who said in *Florida vs. Georgia*, 17 How., 478, on page 504:

"The State of Georgia has consented to be sued by one or more States, or by a foreign State, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more States, or with a foreign State, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not by its terms extend."

And we think the point is expressly ruled *in the refusal by this Court,* in the case of *Cal. vs. S. P. Co.,* 157 U. S., 229, 256, when it refused, on motion made, to permit the city of Oakland to be joined as co-complainant with the State.

Again, under the Judiciary Act of 1875, and probably under that of 1887-1888, the Circuit Court has no jurisdiction unless each person for whose benefit the suit is brought and who will, if it is successful, reap the fruits of the recovery, could maintain the suit against each one of the defendants.

This is established by the Removal Cases, 100 U. S., and Blacklock's case, 127 U. S., 95.

If this rule of law results merely from the fact that the Judiciary Act only confers jurisdiction upon the Circuit Courts of suits in which there is a "controversy" betweeen citizens of different States, surely a similar rule should apply to suits against States when the Constitution confers jurisdiction only when the controversy is between "two or more States," and in addition to that a suit by AN INDIVIDUAL, OR ON BEHALF OF AN INDIVIDUAL, is expressly forbidden by the Eleventh Amendment.

New Hampshire vs. Louisiana, 108 U. S., 72.

The decisions of this Court upon that amendment have certainly not tended to minimize its effects, but to maintain it in letter and in spirit.

In Va. Coupon Cases, 114 U. S., 322, Mr. Justice Bradley, speaking for the Chief Justice, Justice Miller, Gray and himself, said:

"Moreover, the Eleventh Amendment is not intended as a

mere formula of words, to be slurred over by subtle methods of interpretation, so as to give it a literal compliance, without regarding its substantial meaning and purpose. It is a grave and solemn condition, *exacted by sovereign States for the purpose of preserving and vindicating their soverign right to deal with their creditors and others propounding claims against them,* according to their own views of what may be required by public faith and the necessities of the body politic. We have no right, if we were disposed, to fritter away the substance of this solemn stipulation by any neat and skilful manipulation of its words. We are bound to give it its full and substantial meaning and effect."

In the subsequent case of *Hans vs. Louisiana,* delivering the opinion of the Court, the same learned Justice said:

> "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that when the Eleventh Amendment was adopted it was understood to be left open for citizens of a State to sue their own State in the Federal Court, whilst the idea of suits by citizens of other States, or foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States; can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

The case of *Smith vs. Reeves,* 178 U. S., 436, was decided upon similar grounds.

This language is applicable to the present case.

When we remember the indignation aroused by the decision in Chisholm's case and the promptitude and unanimity with which it was corrected by the adoption of the Eleventh Amendment, we do not think it reasonable to suppose that it was intended to permit States to be sued by the simple device of joining a State as a co-complainant, or *by assigning a part of a claim secured by a mortgage* to another State and getting that State to foreclose, making the individual assignor, the chief beneficiary of the suit, a co-defendant with the State.

A suit by South Dakota, and by, or for the benefit of, Charles Salter, against North Carolina, is not merely a controversy between two or more States; it is, in addition to that, a suit by an individual against a State, and so forbidden.

We go further; we contend that this suit is, in purpose and effect—is substantially—one solely by individual holders of the bonds, using the name of the State of South Dakota, against the State of North Carolina.

In *New Hampshire vs. Louisiana,* 108 U. S., 76, Chief Justice Waite said, on page 89:

"No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced and are now prosecuted solely by the owners of the bonds and coupons."

The same may be said with greater propriety of the present suit.

Of course the scheme is somewhat varied, but equally transparent. In the New Hampshire and New York cases it was apparently thought that a controversy between two States, justiciable in this Court, could be created by the individual owner of repudiated State bonds transferring the legal title to a State for collection; in this it appears to be thought that the owners of a large number of State bonds, supposed to be secured by a mortgage, can collect their bonds by assigning to a complainant State a few of the bonds, and having that State foreclose the mortgage for the benefit of all; the scheme is, in fact, similar to the other, the difference being merely that the bondholders in this hire the State to bring the suit by giving her a small number of the bonds—a contingent fee, instead of inducing her to do so gratuitously.

The result to the State of North Carolina and to the bondholders is the same—individuals have prosecuted successfully a suit against a State contrary to our understanding of the effect of the New Hampshire case, which is that, by no scheme or contrivance, can a suit commenced, or prosecuted, which, in effect, is a suit by indviduals against a State.

What are the facts?

Simon Schafer and his brother own and control practically all of the bonds sued on, which are claimed to be secured by a second mortgage upon the stock of the North Carolina Railroad Company, owned by the State of North Carolina—they make several unsuccessful attempts to secure better terms than those upon which the State compromised with the vast majority of the holders of similar bonds—they employ numerous counsel, of

record and otherwise, they petition the General Assembly of North Carolina early in 1901 unsuccessfully—former Senator Butler, one of their counsel, induces one of his friends, Senator Pettigrew, to procure the passage of an act of the Legislature of South Dakota for accepting and collecting donations of bonds, etc.—this act is said to have been introduced by Colonel Stewart, who is solicitor of record for complainant, and Governor Herried says was probably employed at the time the donation was made. Governor Russell, counsel for the Schafers, says that the feasibility of assigning a portion of the bonds to some State for purpose of suit was discussed (Record, p. 108), and that he understood, or inferred, that the purpose of the act mentioned above was to enable the State of South Dakota to receive a donation of bonds with a view of bringing suit against the State of North Carolina (Record, p. 108); the Schafers were reluctant to make the donation, but did so and sent with the bonds a letter containing the following sentences:

"Hon. Charles H. Burke,

"Dear Sir:—The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second mortgage bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota. * * *

> "The bonds are all now about due, besides, of course, the coupons, which amount to some 170 per cent. of the face of the bonds.
>
> "The holders of these bonds have been advised that they cannot maintain a suit against the State of North

Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States."

Simon Schafer, the active manager of this business and now dead, upon a remonstrance by his brother against the donation, said "it would probably inure to the benefit of the remaining bonds." (Record, p. 74.)

On the other hand, Governor Herried (Record, p. 36), who seems to have had little to do with the matter, it being left to the Attorney-General, Pyle (who is dead), says that the bonds were handed to him on September 21, 1901, and there were present Congressman Burke, Attorney-General Pyle, and his associate counsel, Colonel Stewart, and himself, and that he had understood from Mr. Pyle or Mr. Burke, some weeks before the donation, that a suit upon these bonds might be necessary, and Colonel Stewart had been employed; that none of the authorities of South Dakota had ever made any demand upon the authorities of North Carolina for payment or adjustment, and in explanation of the strange conduct, said he supposed the legal department would do what was proper, he left it to them, and Governor Aycock says the first intimation he had of the matter was from a notice in the papers that an application had been made to this Court for leave to file this bill.

These circumstances, mostly drawn from reluctant witnesses, taken in connection with the allegations of the bill, and the answer of Charles Salter, we think justify us in saying that there can be no doubt that the purpose of the assignment was to have this suit brought, and that, although the donation of the

bonds was absolute and unconditional, the authorities of South Dakota were aware of this purpose and assented to it, tacitly perhaps, but they assented.

We do not think any one can read the pleadings and proofs without seeing that the Schafers are the actors, the moving spirits, the real plaintiffs, and that the suit is instituted in pursuance of a scheme invented by the Schafers, or their counsel, to collect these bonds by hiring the State of South Dakota to bring the suit instead of merely employing counsel to do so.

But in the original argument counsel for the Schafers were understood to admit the transfer was made to the State of South Dakota for the purpose of enabling it to bring this action; and he argued that that was immaterial, that the assignors had a right to make a donation of the bonds, and that the motive or purpose with which the assignment was made was immaterial, and cites several authorities to the effect that if a man does a legal act the motive with which he does it is immaterial in law.

We admit that such is the general rule, and that there are decisions of this Court applying it to cases of jurisdiction arising from differences of citizenship, but even in those cases it is necessary that the assignors should retain absolutely no interest in the thing assigned.

Farmington vs. Pillsbury, 114 U. S., 138.
Cross vs. Allen, 141 U. S., 533.
Lehigh Min., etc., Co. vs. Kelly, 160 U. S., 341.
Lake Co. Commrs. vs. Dudley, 173 U. S., 253.

And this transfer comes within the condemnation of those cases, because, according to the bill and the argument of the

complainant's counsel, the thing assigned was not so much the ten bonds as an interest in the mortgage security, and the assignors not only retained an interest, but almost the whole of the mortgage, so much so as to justify us in saying that the complainant only gets a commission for collection.

Not only that, but there are cases in which the motive makes the difference between the lgality and the illegality of the act done, such as in the cases of assignments for the benefit of creditors, and it seems to us to be arguable that where an assignment is made with the very purpose of accomplishing a result forbidden by the Constitution of the United States, or any amendment thereof, as here by the Eleventh Amendment, that such assignment and transfer is void, especially when the assignee participates in the illegal purpose, as we think is the case here.

If she did not, it is difficult to understand why the authorities of South Dakota did not communicate with those of North Carolina, unless they were afraid settlement would be made and this beautiful scheme thwarted.

We submit, however, that it is not necessary for us to show that the State of South Dakota participated consciously in this scheme—it is sufficient that she, being a mere volunteer, became the passive instrument of the bondholders in carrying it out.

In *Abrams vs. Cureton*, 74 N. C., 523, it was decided that the plaintiff, to whom a note had been endorsed under a contract to collect and pay over the proceeds to the endorser, after retaining compensation for services, could not recover in his own name, because he was not "the real party in interest."

We respectfully insist that that is true here; the State of South Dakota is not the real party in interest; that the suit was commenced, and is prosecuted, solely for the benefit of private individuals, who, in the event of recovery, will be the sole beneficiaries, after deducting the costs of the suit, including the fee to South Dakota.

But whether we are right in this or not, the result of a successful termination of the suit will certainly be to enable private individuals to prosecute a suit against a State.

We do not believe that the prohibitions of the Eleventh Amendment can be so easily nullified.

GEORGE ROUNTREE,
Of Counsel.

ROBERT D. GILMER,
Attorney-General.
JAMES E. SHEPHERD,
JAMES H. MERRIMON,
Counsel for North Carolina.